Supreme Court, U.S.
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No. 96-1131

IN THE

Supreme Court of the United States

October Term, 1996

DEBORAH I. VOLBERG,

Petitioner,

against

GEORGE E. PATAKI, Individually and as Governor of State of New York, CONSTANCE KELLOGG-BARELLA, Individually and as Deputy Commissioner of the NYS Dept. of Environmental Conservation, FRANK BIFERA, Individually and Acting as General Counsel to the Dept. of Environmental Conservation, MICHAEL FINNEGAN, Individually and in his capacity as counsel to the Governor, and GAVIN DONOHUE, Individually and in his capacity as Special Assistant,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

1. Whether certiorari is warranted to clarify the First Amendment rights of terminated senior policy-makers, based upon an alleged conflict in the Courts of Appeals, where any differences in case outcomes simply reflect the particular place occupied by the individual employee-plaintiffs on the spectrum of policy-making authority, as well as the peculiar facts of each case.

2. Whether certiorari is warranted where the dismissal of the complaint was independently grounded on substantive Title VII precedent and qualified immunity.

Parties

The names of all parties appear in the caption of the case.

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DEBORAH I. VOLBERG,

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GEORGE E. PATAKI, Individually and as Governor of State of New York, CONSTANCE KELLOGG-BARELLA, Individually and as Deputy Commissioner of the NYS Dept. of Environmental Conservation, FRANK BIFERA, Individually and Acting as General Counsel to the Dept. of Environmental Conservation, MICHAEL FINNEGAN, Individually and in his capacity as counsel to the Governor, and GAVIN DONOHUE, Individually and in his capacity as Special Assistant,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION [1]

Statutes Involved

42 U.S.C. § 2000e, subdivision (f)

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. * * *

New York Civil Service Law § 80(1)

Where, because of economy, consolidation, or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished * * * [,] suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs * * *.

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[1] References to "App" refer to the Appendices to the Petition for Writ of Certiorari.

Counter-Statement of the Case

Petitioner's case is based upon a legal analysis memorandum to senior management at the New York State Department of Environmental Conservation ("the Department") which she wrote while employed as the Department's Acting General Counsel. She had been asked to, and did, identify seven of the Department's civil-service attorney positions to be eliminated as part of down-sizing of government. Petitioner's memorandum (*see* App, A-33--A-35) asserted that this retrenchment would result in State liability under Title VII of the Civil Rights Act [42 USC §§ 2000e *et seq.*] because of what petitioner assumed would be a disparate impact on recently hired minorities, who had little seniority. Shortly after petitioner sent the memorandum to respondents, she was terminated.

During her tenure at the agency, petitioner occupied senior policy-making positions, culminating in the position of Acting General Counsel. This was the position petitioner held when she wrote the memorandum in question (*see* App, A-44--A-45, ¶¶ 2-6; A-51--A-53; A-67; A-69--A-71). Her duties included: supervising bureau chiefs; counseling clients; managing caseloads; setting priorities for staff attorneys; ensuring coordination of activities among bureaus and all other units of the Department; requesting and allocating the Legal Affairs Division's fiscal and personnel resources; providing legal advice to the Commissioner; ensuring that program staff and managers had ready access to timely and reliable legal advice; approving case settlements and other resolutions; fostering a professional relationship with staff attorneys; encouraging professional growth for staff; maintaining good working relationships with other state agencies; and acting as the effective spokesperson for the Department's legal office. In short, by the time she was acting as General Counsel, she was the highest ranking attorney

in the entire agency. She was entrusted with expansive "policy-making" powers (App, A-51--A-53; A-56; A-58; A-65; A-67--A-69).

New York State employees are generally divided into four classes: "exempt", "non-competitive", "labor", and "competitive" (App, A-44, ¶ 3). Petitioner's position, which required the trust and confidence of the Department Commissioner, was classified as "exempt" (App, A-44, ¶ 3). "Exempt" employees do not obtain tenure, may be terminated without cause, and are not entitled to hearings prior to termination (App, A-44, ¶ 3). Petitioner never objected to her classification as an "exempt" employee (App, A-44, ¶ 3).

The amended complaint included allegations of "political termination" (*see* A-32 -- A-33, ¶¶ 10-13; A-35 -- A-36, ¶¶ 15-16), which petitioner later withdrew (*see* Petition, p 9). In the remaining claims which were not withdrawn, petitioner asserted that she had been terminated in response to her speech which opposed the firing of minority employees (A-35, ¶¶ 15-17).

The amended complaint was dismissed on two, independently dispositive grounds: first, for failure to state a claim upon which relief could be granted; and, second, on grounds of qualified immunity. *Volberg v Pataki*, 917 F Supp 909 (NDNY 1996) (App, A-8--A-27), *affd in unpublished memorandum*, ___ F3d ___ (2d Cir 1996) (text available on WESTLAW at 1996 WL 601405) (App, A-1--A-6). Both courts held that petitioner had not established a prima facie case of retaliatory discharge, since she could not have had an objectively reasonable belief that the planned retrenchment at the Department would violate Title VII (App, A-4, ¶ 1; A-13--A-15). Both courts recognized that an employer is not liable for any discriminatory effects of layoffs which might result from a bona fide seniority plan (App, A-4,

¶ 1; A-17--A-18). Both courts also agreed that petitioner's memorandum, in the context of legal advice to senior management, did *not* deal with matters of "public concern" as that term of art is used in the First Amendment context (App, A-4--A-5; A-19--A-23). Hence, her speech was not protected. Finally, as an independently dispositive ground for dismissal of the amended complaint, both courts agreed that respondents were entitled to qualified immunity (App, A-5--A-6; A-23--A-27). As prior precedent supported the termination of policy makers in comparable circumstances, respondents did not violate any "clearly established" constitutional right of petitioner (App, A-5--A-6; A-23--A-27).

ARGUMENT

POINT I

The alleged conflict in decisional law is non-existent.

Petitioner relies (Petition, pp 12-13) on cases from Circuit Courts of Appeal for an alleged conflict with the decision below. Those cases are factually distinguishable. There is no "conflict".

Petitioner claims (Pet., p 12) that the Second Circuit's unpublished decision conflicts with *Stough v Gallagher*, 967 F2d 1523 (11th Cir 1992), *reh. denied*, 978 F2d 718. The plaintiff in *Stough* was a deputy sheriff with very limited policy-making authority. *See* 967 F2d at 1529. Gallagher was the incoming Republican Sheriff and Stough had campaigned for Gallagher's Democratic opponent. Stough had occupied the civil-service position of Captain prior to the election. Upon election, Gallagher demoted plaintiff two ranks, from Captain to Sergeant. Sheriff Gallagher also re-published a *Career Civil Service Policy and Procedure Manual*, the relevant portion of

which confirmed pre-existing policy that officers at the rank of Captain or below were *not* policy-makers subject to removal by newly elected Sheriffs, except "for cause". *Stough*, 967 F2d at 1524-25. Thus, the defendant himself had promulgated a policy manual which assured deputies like plaintiff that employees at or below the rank of Captain were not subject to termination on account of political affiliation. *Stough*, 967 F2d at 1529.

There is no similarity at all between *Stough* and the case at bar. Petitioner was the chief legal counsel and a Deputy Commissioner at the Department. She had no civil service protection at all and thus had no expectations of continued employment. Unlike the plaintiff in *Stough*, petitioner was a high-level "policy-maker". *See* pp 2-3, supra. Thus, petitioner's first case in support of the alleged "conflict" is easily distinguishable.

Petitioner also relies (Pet, p 12) on *Patrick v Miller*, 953 F2d 1240 (10th Cir 1992). The plaintiff in *Patrick*, the former city finance director, had complained that one of the city managers had discriminated against black female employees by limiting them to "out of pocket" reimbursements for official travel, while white employees were reimbursed under the higher, mileage-based formula. Plaintiff had also criticized defendants for balancing a municipal budget by raiding a pension fund. *See Patrick*, 953 F2d at 1244, 1246-47. The Tenth Circuit said that "Patrick's statements concerning potential illegalities in the City budget process most certainly addressed a matter of political and social concern to the community". *Patrick*, 953 F2d at 1248. Plaintiff in that case had a fiduciary duty to other retirement board members to identify potentially illegal uses of retirement fund monies. 953 F2d at 1247.

Patrick is distinguishable from the case at bar. In addition to his speech critical of an unexplained and unjustified difference in reimbursing employee expenses (based on race), plaintiff in *Patrick* acted as a "whistle-blower" in objecting to the perceived illegal raid on the employee pension fund. In the case at bar, by contrast, petitioner was rendering legal advice to top government officials. The context was a memorandum related to down-sizing of government. An internal memorandum of legal advice is not remotely comparable to the facts of the cases upon which petitioner relies.

Finally, petitioner relies (Pet, p 13) on several Seventh Circuit cases. *See*, *Marshall v Porter County Plan Commission*, 32 F2d 1215 (1994), *cert. denied sub nom. Porter County Plan Commission v Marshall*, 115 S. Ct. 1111, 130 L.Ed.2d 1076 (1995); *Warzon v Drew*, 60 F3d 1234 (1995); and *Wilbur v Mahan*, 3 F3d 214 (1993). Those cases are also distinguishable.

Marshall was a "whistle blower" claim in which the former executive secretary of the county planning commission publicly criticized excessive mileage reimbursements received by the county building inspector, that officer's failure to perform building inspections, his pursuit of political activities on county time, as well as his failure to comply with the county's "open door" law. That "speech" is not remotely comparable to the legal analysis memorandum in the case at bar.

The other two Seventh Circuit cases cited by petitioner (*Warzon*; *Wilbur*) upheld summary judgment dismissals of the complaints. The plaintiff in *Warzon* was discharged following her criticism of superiors regarding the administration of the county health care plan. The Seventh Circuit affirmed the summary judgment dismissal of the complaint because plaintiff was a "policy-maker". The same result obtained in *Wilbur*,

where a deputy sheriff who had announced an intention to run for office against the incumbent was forced to take an involuntary leave of absence. The Seventh Circuit held that the employer could take into account the political affiliation of "policy-making" deputies.

Thus, the Seventh Circuit cases offer no support at all for the claim of an alleged conflict. The purported "conflict" among the Courts of Appeal is simply non-existent.

POINT II

The petition does not otherwise present legal questions warranting this court's review.

A. *Petitioner could not have had an objectively reasonable belief that disparate impact, resulting from the seniority effect of layoffs, would violate Title VII.*

The courts below correctly held (App, A-4, ¶ 1; A-13--A-15) that petitioner's Title VII claim failed to demonstrate facts which would support a "good faith, reasonable belief that the underlying challenged actions of the employer violated [Title VII]." *Manoharan v Columbia University College of Physicians and Surgeons*, 842 F2d 590, 593 (2d Cir 1988). A prima facie claim of retaliation under Title VII requires, among other things, that a person claiming to have been fired for protesting violations of other employees' rights under Title VII must have had an objectively reasonable belief that the challenged actions violated Title VII. *See Reed v A.W. Lawrence & Co., Inc.*, 95 F3d 1170, 1177-78 (2d Cir 1996). Petitioner failed to meet that threshold requirement since, in light of the seniority-based limitations on Title VII liability for disparate impact from layoffs, it was not objectively reasonable for the Department's Acting General

Counsel (petitioner) to believe that layoffs would result in liability.

Petitioner simply ignores the point that the "disparate impact", if any, upon minority employees at the Department resulted from a bona fide seniority system. Therefore, petitioner would have to allege, and ultimately prove, that New York Civil Service Law § 80—the statutory codification of the seniority rules—had been adopted with the *intent* to discriminate. *See, e.g., Trans World Airlines, Inc. v Hardison*, 432 US 63, 82 (1977). Petitioner has made no such allegation and has tendered no such proof.

It is a fact of life that those with less seniority are more vulnerable to down-sizing or retrenchment. For more than a century, New York's civil service seniority system has provided that layoffs will be based on seniority. *See, e.g., Turner v Berle*, 61 AD2d 712, 713-714, 404 NYS2d 50, 51-52 (3d Dept 1978) (the Department, in 1977-1978, was required to abolish 87 civil service positions to implement a 5% budget reduction); *Coleman v D'Ambrose*, 87 Misc 2d 341, 342-344, 384 NYS2d 942, 943 (Sup Ct New York Co 1976) (in times of retrenchment due to fiscal austerity, terminations are based on seniority); *see also, Lethbridge v Mayor*, 133 NY 232, 235-237, 30 NE 975, 976-977 (1892) (all civil service appointments are subject to the condition that the hiring agency receive sufficient budgetary allotments to fund the item; reductions in force are the normal and necessary consequence of shortfalls in appropriations for personnel expenses); *Crow v Ambach*, 96 AD2d 642, 465 NYS2d 71 (3d Dept 1983) (when an agency faces budgetary restrictions, it may abolish civil service items to accommodate those constraints).

Disparate impacts from the application of a neutral "last-hired, first-fired" seniority system do *not* violate Title VII. *Lorance v AT&T Technologies*, 490 US 900, 908-909 (1989); *Chance v Board of Examiners*, 534 F2d 993, 997-998 (2d Cir 1976), *cert. denied*, 431 US 965 (1977); *see also*, *Banas v American Airlines*, 969 F2d 477, 481, n.5 (7th Cir 1992) ("disparate impact cannot be used to invalidate a seniority system; intentional discrimination must be shown"). The existence of such a neutral seniority system is not an affirmative defense to be proven by an employer, but, instead, is a substantive limitation on Title VII liability. *Lorance v AT&T Technologies*, 490 US at 908-909; *see also*, Schlei & Grossman, *Employment Discrimination Law* (2d ed. 1983), pp 59-61; *id.*, 1987-1989 Supplement (published in 1991), p 12.

Since petitioner failed to allege a prima facie claim of retaliation, her Title VII claim was properly dismissed. That dismissal presents no question warranting this Court's review.

B. *The amended complaint was properly dismissed on the basis of qualified immunity.*

In any event, the amended complaint was properly dismissed for the independently sufficient ground of qualified immunity. Based on prior precedent, executives in respondents' position were entitled to assume that policy-making deputies, like petitioner, had only diminished expectations of First Amendment rights. In *Connick v Myers*, 461 US 138 (1983), this Court indicated that there is a substantial governmental interest in the effective and efficient operation of governmental agencies. In *Connick*, an elected District Attorney ("DA") terminated an assistant who had objected to how the DA ran the office. The employee had circulated a questionnaire critical of the DA, involving issues such as case assignments, as well as fund-

raising. This Court assumed that the "speech" regarding whether or not the DA had ever pressured employees to work on political campaigns met the threshold for speech relating to matters of "public concern". 461 US at 143-149. Nevertheless, this Court held that the termination of the employee did not affront the First Amendment. Because plaintiff's speech tended to undermine the DA's authority and to destroy the close working relationships in the office, the governmental interest in efficient operations outweighed any First Amendment interest of the employee.

In the case at bar, petitioner was not merely *an* attorney in a large law office; rather, she was the general counsel, meaning the chief legal advisor for the head of the agency. Surely, if ever there are any positions for which attorneys have substantially diminished First Amendment rights, petitioner's job was such a position. The Second Circuit has long held that government attorneys have very limited First Amendment protection, at least when the "speech" relates to the formulation of legal policy appropriately determined by the head of the agency. *See*, *e.g.*, *Giacalone v Abrams*, 850 F2d 79, 86-88 (1988) (assistant attorney general terminated for dissenting from top management's decision on how to resolve unsettled tax-law questions); *Lefcourt v Legal Aid Society*, 445 F2d 1150, 1153 (1971) (legal aid lawyer fired for dissenting from office's "plea bargaining" policy). In *Giacalone* and *Lefcourt*, the Second Circuit assumed that some of the staff attorneys' speech passed the threshold test for speech relating to matters of "public concern". Nonetheless, the court found that the governmental interest in having management set legal policy on open questions substantially outweighed any First Amendment interests of staff attorneys. Petitioner's case here is much weaker than those found wanting in *Giacalone* and *Lefcourt* because petitioner was General Counsel, rather than merely a staff attorney. Top management is

surely entitled to the highest degree of confidence and trust in its General Counsel.

In view of this Second Circuit authority, respondents did not violate any "clearly established" rights of petitioner. Therefore, the amended complaint was properly dismissed on the basis of qualified immunity, and this Court's further review is not necessary.

C. *Petitioner cannot assert First Amendment claims deriving from Title VII because, as an officer's "personal staff", she was not a covered employee under Title VII.*

Although respondents did not advance this argument below, there is a further, dispositive ground why the amended complaint fails to state a claim upon which relief can be granted. *See*, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993), § 6.37, pp 373-374 (suggesting the appropriateness of raising alternative grounds to show the correctness of decision below or to indicate why the writ should be denied). Petitioner's First Amendment claims derive from her assertion that she was the victim of retaliatory termination because of her protest about alleged discrimination against other employees. However, petitioner has no standing to assert a Title VII retaliation claim. She does not meet the statutory definition of "employee" in section 2000e of Title 42 of the United States Code. Petitioner is specifically *excluded* from coverage under Title VII by virtue of the "personal staff" exception set forth in section 2000e, subdivision (f), which provides as follows:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not

> include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, *or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office*. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. * * * (Emphasis added.)

As set forth above (*supra*, pp 2-3), petitioner is unquestionably a "policy-making" advisor to a Cabinet level officer. She was exempt from the state civil service protections. Therefore, the limitation clause on the "personal staff" exemption in § 2000e(f) for employees with civil service protection is inapplicable. In short, petitioner was not a covered employee under Title VII. *Cf. Gregory v Ashcroft*, 501 US 452, 467 (1991) (state judges, appointed by the Governor, were not protected by the Age Discrimination in Employment Act because they hold "policy-making" positions).

In *Gunaca v State of Texas*, 65 F3d 467 (5th Cir 1995), the court identified relevant factors to examine in determining whether an employee fell within the "personal staff" exemption with respect to elected officials or high-level appointees of elected officials: [1] whether the official has plenary powers of appointment and removal; [2] whether plaintiff is personally accountable to that official; [3] whether plaintiff represents that official in the eyes of the public; [4] whether the official exercises considerable control over the position occupied by plaintiff; [5] the level of plaintiff's position within the organization's chain of command; and [6] the intimacy of actual working

relationship between plaintiff and the officer. *Gunaca*, 65 F3d at 470 (construing ADEA exemption language identical to that in Title VII); *Teneyuca v Bexar County*, 767 F2d 148, 151 (5th Cir 1985) (same in Title VII case); *Americanos v Carter*, 74 F3d 138, 143-144 (7th Cir), *cert. denied*, 116 S. Ct.1853, 134 L.Ed.2d 953 (1996) (equating "personal staff" exemption in ADEA and Title VII with the "policy-maker" limitation on First Amendment liability recognized in political patronage cases). Petitioner's position as General Counsel obviously satisfies most or all of the *Gunaca* factors.

Although the lower courts have divided on whether particular plaintiffs were actually "policy-makers", once an employee has been determined to be a "policy-maker", he or she has no rights under Title VII and claims thereunder will be summarily dismissed. *See, e.g., Gunaca*, 65 F3d at 470-474 (investigator in district attorney's office was a "policy-maker"); *Americanos*, 74 F3d at 140-144 (same as to deputy attorney general); *Teneyuca*, 767 F2d at 150-153 (same as to assistant district attorney); *Dubisar-Dewberry v District Attorney's Office*, 927 F Supp 1479, 1483-86 (MD Ala 1996) (same as to child support coordinator); *Wall v Coleman*, 393 F Supp 826, 827-831 (SD Ga 1975) (same as to assistant district attorney); *but see, Montgomery v Brookshire*, 34 F3d 291 (5th Cir 1994) (because of factual dispute as to employee's status, court could not summarily dismiss complaint of deputy sheriff); *Johnson v Board of County Commissioners for County of Fremont*, 859 F Supp 438, 442-444 (D Colo 1994) (same as to sheriff's office dispatcher); *see also, Cromer v Brown*, 88 F3d 1315, 1322-1325 (4th Cir 1996) (examining job responsibilities of deputy sheriffs on a case-by-case basis).

Therefore, there are multiple, independently sufficient reasons why certiorari should not be granted.

Conclusion

This Court should deny the writ.

Dated: Albany, New York
February 12, 1997

Respectfully submitted,

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